United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1438

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1438

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES MELVIN GREEN,

Defendant-Appellant,

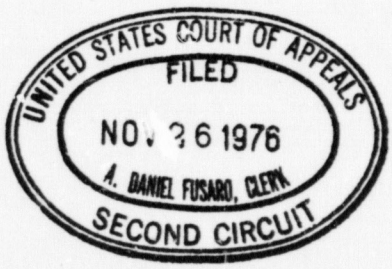
and

DEBRA FENNELL GREEN,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT



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Defendant-appellant James Melvin Green appeals from a judgment entered on September 14, 1976 by the United States District Court for the Southern District of New York, after a trial before the Honorable Robert J. Ward, U.S.D.J.,

and a jury, adjudging the defendant-appellant guilty on three counts of bank robbery or attempted bank robbery in violation of 18 U.S.C. § 2113(a), and two counts of using a dangerous weapon in committing or attempting to commit bank robbery in violation of 18 U.S.C. § 2113(d). Defendant-appellant was sentenced to serve concurrent terms of imprisonment for twenty years on the counts under 18 U.S.C. § 2113(a), and received a suspended sentence with one day's probation on the counts under 18 U.S.C. § 2113(d).

ISSUES PRESENTED

1. Was it error to permit the Government to introduce into evidence against defendant-appellant James Melvin Green a revolver, a holster, and three bullets which were seized from Green at the time of his arrest, subsequent to the last of the three bank robberies or attempted bank robberies involved in this case?

2. Were the photo spreads which were shown before the trial to all of the witnesses who identified Green as one of the bank robbers at the trial so unnecessarily and impermissibly suggestive as to require the exclusion of these identifications at the trial?

3. Should the District Court have granted Green's motion for a judgment of acquittal on Count Three of the indictment, as to which no witness identified Green as one

of the bank robbers at the trial?

4. Was it proper for the Government to join in a single indictment charges relating to three separate bank robberies or attempted bank robberies on different days, when the testimony and other evidence relating to each of the three robberies or attempted robberies was substantially different and non-overlapping?

STATEMENT OF THE CASE

A. The Charges Contained in the Indictment

The indictment in the present case (A3-A6) was filed on May 28, 1976 against the defendant-appellant, James Melvin Green, and his wife, Debra Fennell Green. The indictment contained five counts, relating to three distinct bank robberies or attempted bank robberies on three different days.

Count One of the indictment (A3) charged the defendants with robbing and attempting to rob the branch of the Manufacturers Hanover Trust Company located at 1185 Avenue of the Americas in New York City on February 25, 1976, in violation of 18 U.S.C. § 2113(a). Count Two of the indictment (ibid.) charged the defendants with using a dangerous weapon in committing and attempting to commit the same robbery, in violation of 18 U.S.C. § 2113(d).

Count Three of the indictment (A4) charged the

defendants with attempting to rob the branch of the First National City Bank located at 40 West 57th Street in New York City on March 5, 1976, in violation of 18 U.S.C. § 2113(a).

Count Four of the indictment (A4) charged the defendants with robbing and attempting to rob the branch of the National Bank of North America located at 515 Seventh Avenue in New York City on March 8, 1976, in violation of 18 U.S.C. § 2113(a). Count Five of the indictment (A4-A5) charged the defendants with using a dangerous weapon in committing and attempting to commit the same robbery, in violation of 18 U.S.C. § 2113(d).

The indictment in the present case was a superseding indictment. The original indictment against the defendants, Indictment No. 76 Cr. 267, which was filed on March 17, 1976, related solely to the attempted robbery of the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas on February 25, 1976. The charges concerning the attempted robbery of the First National City Bank branch at 40 West 57th Street on March 5, 1976 and the robbery of the National Bank of North America branch at 515 Seventh Avenue on March 8, 1976 were added for the first time in the superseding indictment.

B. The Evidence Presented at the Trial

The Government's case against the defendant-appellant at the trial consisted of the testimony of five bank employees from the three banks involved, three bank surveillance photo-

graphs from two of the banks, and the revolver, holster, and bullets which were seized from Green upon his arrest. The bulk of the Government's evidence related to the attempted robbery of the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas on February 25, 1976. With the sole exception of the revolver, holster, and bullets which were seized from Green upon his arrest, each item of the Government's evidence related to only one out of the three robberies or attempted robberies which were enumerated in the indictment. The District Court expressly instructed the jury to consider the evidence relating to each of the three robberies separately:

> "In considering each of the three robberies you should consider only the direct and circumstantial evidence relating to that robbery in your consideration of the particular count on which you are then deliberating." (A740.)

1. The Attempted Robbery of the Manufacturers Hanover Trust Company at 1185 Avenue of the Americas on February 25, 1976 (Counts One and Two)

The attempted robbery of the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas on February 25, 1976 was the subject of testimony by three witnesses, Charlene Churilla (A449-A483), Celinda Rivera (A495-A546), and Gene Thomas White, Jr. (A547-A555).

Miss Churilla, a teller, testified that at about 11:35 A.M. on February 25, 1976 a man and a woman presented themselves at her teller's station (A449-A450). The woman

showed Miss Churilla a note which read, "We have a gun. Give us fifties and twenties." (A450, A476.) Miss Churilla looked at the man and saw that he had a gun pointed at her (A450-A451, A476). She closed and locked the drawers at her station and pressed a silent alarm (A450). She asked whether they had a bag for her to put the money in, and the man, speaking very rapidly, said, "No, just give it to her." (A450, A473.) Miss Churilla said that she was unlocking her drawers, and the man told her not to pull any buttons while she was down there (A451). After "a couple of seconds" the man looked the other way, and Miss Churilla, who had been looking for a chance to duck, ducked underneath the counter (A451, A480). When she stood up again, the man and woman were gone (A479).

Miss Churilla testified that the man was a Negro about five feet, nine inches tall and weighing about 140 or 150 pounds, with close-cropped hair and a "beigeous-brown" cloth coat (A452, A475). When asked whether the man's eyebrows were thick or thin, she responded, "It happened so fast I really couldn't tell you." (A474.) Although Miss Churilla estimated that she was able to observe the man and the woman for a minute and a half to two minutes or even three minutes (A451, A479-A481), this estimate is irreconcilably at variance with her testimony that "[i]t happened so fast" (A474), and in particular with her testimony that she ducked under the counter after "a couple of seconds" (A480).

Miss Churilla identified Mr. and Mrs. Green in court as the man and woman who attempted to rob her (A453). She also identified two bank surveillance photographs, Government Exhibits 2 and 3 (A773, A774), as showing the man and woman who sought to rob her (A464). Over objection, the District Court admitted Government Exhibits 2 and 3 into evidence (A472). Government Exhibits 2 and 3 show a man wearing a full-length coat with a fur collar and a woman wearing a full-length coat with large plaid squares (see A773, A774).*

The Government's second witness with respect to the attempted robbery on February 25, 1976 was Celinda Rivera, an adjuster at the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas (A495-A496). Miss Rivera testified that her desk is located behind Miss Churilla's counter, facing the wall (A496-A497). She stated that at about Noon on February 25, 1976 she stood up from her desk to answer a telephone call, and saw Miss Churilla kneeling under her teller's counter (A497, A505-A506). Then she saw a man and a woman on the other side of the teller's counter; the man was pounding on the counter with his hands, saying, "Come on, Come on." (A498.) Miss Rivera stared at the man, sat down "for a couple of seconds," and tried to activate the alarm at her desk (A499, A534). At

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* Although Miss Churilla had told an FBI agent on the day of the attempted robbery that the woman wore a rust-brown leather coat (A466-A467), she admitted at the trial that the woman shown in Government Exhibits 2 and 3 appeared to be wearing a cloth coat with huge plaid squares on it (A468).

this point the man and the woman started to walk out, and Miss Rivera got up right away to see where they were going (A534).

Miss Rivera could not describe the man she saw on February 25, 1976 beyond saying that he wore a jacket or shirt of a dark brownish color (A501), and that he definitely was not wearing a fur collar (A503). Miss Rivera stated on direct examination that she thought she had looked at the man and woman for "a matter of minutes" (A499), but this statement is irreconcilable with her testimony that when she saw the man and woman she sat down for only "a few seconds" before they began to leave (A534). Miss Rivera admitted on cross-examination that she did not in fact know how long she had looked at the man and woman (A513-A514).

Miss Rivera identified Mr. and Mrs. Green in court as the man and woman she saw (A499-A500). She was not asked by the Government whether the man and woman shown in Government Exhibits 2 and 3 were the man and woman she saw. As noted above, Government Exhibits 2 and 3 show a man wearing a coat with a fur collar (see A773, A774), while Miss Rivera was "[p]ositive and sure" that the man she saw was not wearing a fur collar (A503).

The Government's third and final witness with respect to the attempted robbery on February 25, 1976 was Gene Thomas White, Jr., who was then working as a teller at the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas (A547). Mr. White testified that he glanced

toward Miss Churilla's counter, which was about 12 or 15 feet away, and noticed that she was "having some exchange" with a man and a woman at her counter (A548). In Mr. White's words:

> "At that time I saw -- I noticed a gun and pulled my alarm, and then turned to see if the guard was on the floor, the banking floor, which he was not, and as I turned back around I noticed that Miss Churilla had gone to the floor and the man and woman had gone out." (A549.)

Mr. White is shown at the left of Government Exhibit 2, looking away from the man and the woman at Miss Churilla's counter (A552; see A773).

Mr. White testified that the man was wearing a short cloth coat of a dark color, perhaps a dark plaid (A553). Like Miss Rivera, Mr. White testified that the man's coat did not have a fur collar (ibid.). Mr. White identified Green in court as the man he saw on February 25, 1976, but did not identify Mrs. Green (A550). Like Miss Rivera, Mr. White was not asked by the Government whether he recognized the man and woman shown in Government Exhibits 2 and 3.

2. The Attempted Robbery of the First National City Bank at 40 West 57th Street on March 5, 1976 (Count Three)

The sole eyewitness with respect to the attempted robbery of the First National City Bank branch at 40 West 57th Street on March 5, 1976 was Lily Yu (A427-A448). Miss Yu was not asked to, and did not, identify either Mr. Green or Mrs. Green as a perpetrator of the attempted robbery.

Miss Yu testified that some time before 2:00 P.M. on March 5, 1976 she looked up and saw a black man and woman at her teller's window (A428). The woman displayed a note that said, "This is a stickup" (ibid.). Miss Yu looked for her alarm, and the man said, "Don't push the alarm" (A428, A442). Miss Yu started to say, "I didn't," but the man said, "She did it. Let's go." (A428, A443.) Thereupon the man and woman turned away and walked out of the bank (ibid.).

Although she testified that the man and woman were at her counter for "[a] couple of minutes" (A428), Miss Yu did not identify either Mr. Green or Mrs. Green as a perpetrator of the attempted robbery. Miss Yu stated that she told an FBI agent on the day of the attempted robbery that both the man and the woman were about five feet, three inches or five feet, five inches tall, and that the man weighed about 130 pounds (A445). She also told the FBI agent that the man wore a short, dark leather jacket (A439-A440).

A surveillance photograph taken at the First National City Bank Branch at 40 West 57th Street was marked as Government Exhibit 1-A (A772) and was admitted into evidence over objection (A607-A608). The right side of Government Exhibit 1-A shows a young man wearing a full-length coat with a fur collar walking toward the door of the bank, followed by a young woman and by another woman (see A772). Miss Yu was not asked to, and did not, identify the young man and woman as the man and woman who attempted to rob her on March 5, 1976.

In view of Miss Yu's failure to identify either of the defendants at the trial, the Government's direct case against the defendants on Count Three of the indictment consisted solely of Miss Yu's extremely generalized description of the man and woman and a single surveillance photograph. Although the District Court denied the defendants' motion for a judgment of acquittal on Count Three of the indictment at the close of the evidence, it stated three times that the Government had made out only "a bare prima facie case" on Count Three (A665, A666), and added, "I'm not sure the Government would have proceeded if they had a one count indictment with Count 3 alone . . . ." (A666.)

3. The Robbery of the National Bank of North America at 515 Seventh Avenue on March 8, 1976 (Counts Four and Five)

The sole witness with respect to the robbery of the National Bank of North America branch at 515 Seventh Avenue on March 8, 1976 was Donna Rae Morrison (A556-A570).

Miss Morrison testified that around Noon on March 8, 1976 a black man and woman came up to her teller's counter (A557). The woman held up a note which read, "This is a stick-up, give us all your money. We have a gun." (A557-A558.) Miss Morrison reached for her buzzer, but the man took out a gun and told her not to do anything (A558). Miss Morrison gave the man approximately $1,400 from her top drawer, and the man and woman walked out of the bank (A558-A559).

Miss Morrison testified that the man was shorter

than the woman, and recalled telling an FBI agent that the man was about five feet, eight inches tall (A566-A567). She also recalled that the man's "facial features were very thin and refined, very -- you could notice them right off the bat." (A567.)

Miss Morrison identified Mr. and Mrs. Green in court as the man and woman who robbed her on March 8, 1976 (A559-A560). However, Miss Morrison also testified that the entire episode lasted less than two minutes (A559, A566), and that during this brief period her attention was "riveted" on the gun (A566).

4. The Evidence Seized From the Defendants Upon Their Arrest

Mr. and Mrs. Green were arrested at about 2:40 P.M. on March 12, 1976 near the corner of 54th Street and Broadway in New York City (A617-A620). The arresting officers removed and seized a small revolver containing three bullets which Mr. Green had in a holster in the left side of his pants (A620-A621).

Mrs. Green dropped her pocketbook when the arresting officers announced themselves (A619). An arresting officer testified that when the pocketbook was later searched, it was found to contain a demand note written on a Chemical Bank withdrawal slip (A622). The note read: "This is a stickup. We have guns. I went all the money. Don't push no button." (A685.) No evidence was presented to link this demand note

to Mr. Green.

The District Court ruled that the demand note would be received as evidence against Mrs. Green but not against Mr. Green (A641-A642). However, the District Court ruled, over objection, that the revolver, holster, and bullets would be received as evidence against Mr. Green (A651).

C. The Photo Spreads Which Had Been Shown to the Witnesses Who Identified Green at the Trial

The testimony given at a pretrial suppression hearing established that each of the witnesses who identified Green at the trial had been shown a photo spread by an FBI agent before the trial and had selected a photograph of Green. For the reasons given in Point II below, defendant-appellant submits that each of the photo spreads shown to these witnesses was unnecessarily and impermissibly suggestive.

The three witnesses who were present at the attempted robbery of the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas on February 25, 1976 - Charlene Churilla, Celinda Rivera, and Gene Thomas White, Jr. - were shown a spread of nine photographs which was marked at the suppression hearing as Government Exhibit H-1 (A775-A776). The spread was shown to each of these witnesses in turn by FBI Agent Edward J. Roach on March 5, 1976, nine days after the attempted robbery (A11-A17).

Charlene Churilla testified that Agent Roach told her that he was going to show her nine photographs "and he

wanted me, to the best of my knowledge, to pick the man that I saw on the 25th of February." (A51.) Miss Churilla testified that she spread the photographs out and eliminated eight of them in turn, telling Agent Roach why they were not the man (A51, A58-A61). Miss Churilla also testified that as soon as she saw the photograph of Green she was confident that this was the man (A59).

Celinda Rivera testified that Agent Roach told her "'Don't rush into it,' and just try to point out which is the person that I saw on the day of the robbery." (A78.) Miss Rivera testified that she then went through the photographs until she selected the person she noticed on the day of the robbery (ibid.). Agent Roach testified that Miss Rivera took almost five minutes to make her selection (A28). When she reenacted this selection at the suppression hearing, the Court noted for the record that it took Miss Rivera approximately 30 seconds to select Green's photograph (A79).

Mr. White testified that Agent Roach

> "said that he would show me a series of photos and wanted me to identify the person whom I thought was the suspect. He did say that the FBI had someone in mind, but, you know, he didn't elaborate on this and I sat down at a table and he showed me the photos." (A112.)

Mr. White testified that he selected the photograph of Green after looking at the photo spread "around a minute, if that long" (A113). Agent Roach testified that it took Mr. White two or three minutes to make this selection (A28).

The sole witness who testified concerning the robbery of the National Bank of North America branch at 515 Seventh Avenue on March 8, 1976, Donna Rae Morrison, was shown a spread of six photographs which was marked at the suppression hearing as Government Exhibit H-20 (A781). The spread was shown to Miss Morrison by FBI Agent Paul F. Cavanagh on April 2, 1976, more than three weeks after the robbery (A228-A229). Miss Morrison testified that Agent Cavanagh asked her to select someone from the collection of men (A248). Miss Morrison stated that it took her less than a minute to select the photograph of Green (ibid.).

There was also testimony at the suppression hearing concerning the showing of photo spreads to persons who did not identify either of the defendants at the trial. So far as appears from the testimony at the suppression hearing, the first such photo spread was shown on February 26, 1976 to one Robert Windram, a witness to a robbery not involved in the present case (A125-A126). This spread, which was marked at the suppression hearing as Government Exhibit H-10 (A777), contained six photographs, including photographs of Green and of one Toby Raines.* After reviewing this photo spread, Mr. Windram told the FBI agent that he could not identify any of

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* The photograph of Green which was shown to Mr. Windram on February 26, 1976 appears at the top right-hand corner of page A777 of the Appendix, and the photograph of Raines appears at the lower left-hand corner of page A777.

the photographs (A156). The agent asked Mr. Windram to look at the photographs again and see "if I could see something close to their looks" (A157). Mr. Windram then picked Green and Toby Raines as being the closest of the six photographs shown to him (A126, A157-A158).

On March 19, 1976 Mr. Windram was shown a new spread of seven photographs, which was marked at the suppression hearing as Government Exhibit H-11 (A778). This spread contained another photograph of Green, but did not contain any photograph of Raines. After reviewing this spread, Mr. Windram picked Green as being the closest (A128, A150-A152). So far as the record shows, the photograph of Raines was omitted, not only from the second photo spread shown to Mr. Windram, but also from all of the photo spreads shown after February 26, 1976 to other witnesses, including the four witnesses who identified Green at the trial.

At the conclusion of the evidence regarding the photo spreads at the suppression hearing, the District Court rendered an oral decision from the bench, concluding that "the identification procedure was not so suggestive as to give rise to a substantial likelihood of misidentification." (A282.)

D. The Deliberations and Verdict of the Jury

The case was given to the jury shortly before lunch on the third day of the trial (A741). Almost immediately the jury sent out a note requesting (1) the testimony of Miss Yu,

(2) the surveillance photographs which had been received in evidence, and (3) the indictment (A742-A743). These were supplied, and the jury was sent to lunch (A745-A746).

After lunch the jury sent out another note, requesting (1) the demand note, (2) the revolver, (3) the holster, and (4) the three bullets (A749-A750). All of these exhibits were sent into the jury room (A750).

Later the jury sent out four notes (A750-A751). The first note asked for Miss Churilla's testimony concerning Green's attire, and the second note canceled this request (A750). The third note asked for Miss Churilla's testimony concerning Mrs. Green, and the fourth note requested the Court's charge on aiding and abetting (A750-A751). The Court responded to the third and fourth requests, and the jury resumed its deliberations (A751-A754).

Toward the end of the afternoon the Court received a note from one of the jurors, who said that because of her religious beliefs it was necessary for her to leave the Court House not later than 7:00 P.M. that day (A754). The Court responded, "Do not worry." (A754-A755.)

At about 6:00 P.M. the jury requested and was supplied with a magnifying glass (A755).

At 6:30 P.M., over objection by Green's counsel, the Court sent the jury a note inquiring whether it had reached a verdict as to any defendant on any count (A755-A759). The jury responded, "Yes." (A759.) The jury also

sent out a note requesting "the entire testimony of Churilla by prosecutor and defense" (ibid.).

Over objection by Green's counsel, the Court ruled that it would take a partial verdict because there was insufficient time to read Miss Churilla's testimony to the jury before 7:00 P.M. (A759-A760). The jury reported that it had found Green guilty on all five counts of the indictment, and that it had found Mrs. Green guilty on Counts Three, Four, and Five of the indictment (A761-A764). With the Government's consent, the Court granted a mistrial as to Mrs. Green on Counts One and Two of the indictment (A764).

ARGUMENT

POINT I

THE GUN, HOLSTER, AND BULLETS SEIZED FROM GREEN AT HIS ARREST WERE IMPROPERLY ADMITTED INTO EVIDENCE AGAINST HIM

The District Court held, over objection, that the revolver, holster, and bullets which were seized from Green at his arrest could properly be received as evidence against Green (A651). Defendant-appellant submits that the revolver, holster, and bullets should have been excluded, because any probative value they possessed was substantially outweighed by the danger of unfair prejudice and confusion of the issues.

Rule 403 of the Federal Rules of Evidence reads as follows:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In the recent case of United States v. Robinson, Slip Opinion 5913 (2d Cir. Nov. 1, 1976) (2-1), this Court held that a .38 revolver taken from a bank robbery defendant at his arrest should have been excluded pursuant to Rule 403 of the Federal Rules of Evidence. This Court explained in Robinson that Rule 403 of the Federal Rules of Evidence

requires a balancing of the possible probative value of a proffered item of evidence against its prejudicial impact. Slip Opinion 5919-5920. The Court further held in Robinson that the "marginal probative value" of the revolver was substantially outweighed by "the possibility of severely unfair prejudice". Slip Opinion 5926.

This Court explained in Robinson that in order to find that the revolver had any probative value on the issue of the identification of the defendant as one of the bank robbers, "the jury would have to draw two quite weak inferences, with the second dependent upon the first and with neither having much basis in the evidence presented at trial." Slip Opinion 5920. First, the jury would be required to infer from the defendant's possession of a revolver at the time of his arrest that the defendant possessed the revolver at the time of the robbery. Slip Opinion 5921-5922. Second, the jury would be required to find that this revolver was the revolver used in the robbery itself. Slip Opinion 5922-5924.

In the present case, these inferences are even weaker than they were in Robinson. The Government presented no evidence on the basis of which the jury could have found that the revolver taken from Green at the time of his arrest even resembled the gun used in any of the robberies or attempted robberies involved in this case. Not one of the Government's witnesses was asked to identify the revolver taken from Green. None of the Government's witnesses was

even asked to describe the gun that was used in any of the robberies involved in this case. There was absolutely no evidence linking the holster and the bullets taken from Green at his arrest to any of the robberies involved in this case. The inescapable fact is that the revolver, holster, and bullets seized from Green at his arrest had no more probative value on the issue whether Green was the perpetrator of any of the robberies involved in this case than would any of the millions of other handguns, legal and illegal, which are in circulation throughout the United States.

The other issue considered by this Court in Robinson was the prejudicial effect of evidence concerning the seizure of a handgun from a defendant arrested in New York City. This Court concluded that such evidence is severely and unfairly prejudicial. Slip Opinion 5926. As the Court explained:

> "When a person is found with a gun in his possession in an urban area such as New York City, many persons might conclude that the gun was being carried in order to commit violent crimes. When, as in this case, the person found with a gun is then singled out by the police and prosecutors, by virtue of his prosecution, as one who is likely to use a gun for an unlawful purpose, a far larger number would conclude that the possessor of the gun is a dangerous person who ought to be segregated from society. . . ." Slip Opinion 5925-5926 (footnote omitted).

The Court added:

> "In view of the comprehensive and well-publicized regulation of firearms in the state and city of New York, regulation that includes criminal penalties [citations

> omitted], many New Yorkers might further conclude that a person arrested with a gun violated a law simply by being in possession of the gun." Slip Opinion 5926 n.11.

The Court further held that although the District Court in Robinson gave a limiting instruction on the use of the gun as evidence, the limiting instruction was insufficient to dispel the prejudice. Slip Opinion 5926-5927 n.12.

In the present case, the prejudice to Green from the admission of the revolver, holster, and bullets was far more severe than the prejudice found by this Court in Robinson. Unlike the District Court in Robinson, the District Court in the present case gave no limiting instruction whatever (see A727). In fact, the Government was permitted to argue at the close of its summation that the revolver, holster, bullets, and demand note showed that the Greens were on their way to rob a bank when they were arrested (A684-A685). Despite the fact that there was no evidence that the revolver seized from Green at his arrest resembled the gun used in any of the robberies involved in this case, the Government placed heavy stress on the revolver in its summation, arguing that the revolver "is among the most damaging pieces of evidence in this case against the defendant James Green." (A684.)

After it began its deliberations, the jury manifested a keen interest in seeing and handling the revolver, holster, and bullets. The jury went so far as to send out a note specifically requesting that it be sent not only the

revolver but also the holster and the three bullets (A749-A750). The strong interest shown by the jury in the revolver, holster, and bullets further confirms that in the present case, even more than in Robinson, the admission into evidence of the revolver, holster, and bullets unfairly and irretrievably prejudiced the defendant-appellant.

POINT II

THE PHOTO SPREADS SHOWN BEFORE THE TRIAL TO THE WITNESSES WHO IDENTIFIED GREEN AT THE TRIAL WERE SO UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE AS TO REQUIRE EXCLUSION OF THE IDENTIFICATIONS AT THE TRIAL

Each of the witnesses who identified Green at the trial had previously been shown a photo spread which contained a photograph of Green (see pp. 13-16 supra). The two photo spreads shown to these witnesses were marked at the suppression hearing below as Government Exhibits H-1 and H-20 (A775-A776, A781). For the reasons set forth below, defendant-appellant submits that these two crucial photo spreads were so unnecessarily and impermissibly suggestive as to require the exclusion of these witnesses' identification of Green at the trial.

In Simmons v. United States, 390 U.S. 377, 384 (1968), the Supreme Court held that an in-court identification following a pretrial identification by photograph will be excluded "if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Supreme Court in Simmons also explained some of the most important dangers of misidentification inherent in the use of unnecessarily suggestive photographic identification procedures:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in

> identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-84 (footnotes omitted).

In Braithwaite v. Manson, 527 F.2d 363 (2d Cir. 1975), cert. granted, 96 S. Ct. 1737 (1976), an undercover agent named Glover, having purchased narcotics from a suspect, was shown a single photograph of Braithwaite, which had been selected by a Detective D'Onofrio because he had identified Braithwaite as the suspect described by Glover. This Court condemned this procedure as being both unnecessarily and impermissibly suggestive:

> "Not only was it impermissibly suggestive, but despite the unexplained statement to the contrary in respondent's brief, it was unnecessarily so. There was no emergency that prevented D'Onofrio from assembling a suitable array of photographs from the

> many fitting Glover's description that must have been available in the files of the Hartford Police Department. . . ." 527 F.2d at 367.

Similarly, in United States v. Fernandez, 456 F.2d 638, 641-42 (2d Cir. 1972), where the bank surveillance photographs showed that the suspect had extremely light skin and an Afro haircut, this Court held that a photo spread which contained only one photograph of an individual with light skin and an Afro haircut was unnecessarily and impermissibly suggestive.

The photo spreads used in the present case, like those used in Braithwaite and Fernandez, were unnecessarily and impermissibly suggestive. In Braithwaite, this Court noted that Detective D'Onofrio had available to him Glover's description of the suspect as a basis for "assembling a suitable array of photographs from [those] fitting Glover's description . . . ." 527 F.2d at 627. Only by assembling such a suitable array of photographs could it have been determined whether Braithwaite, rather than some other person fitting Glover's description, was the suspect described by Glover.

Likewise, in the present case, the FBI had available to it the surveillance photographs which were introduced into evidence at the trial as Government Exhibits 1-A, 2, and 3 (A772, A773, A774), as well as other surveillance photographs which were not introduced at the trial, as a basis for selecting an array of photographs of suspects whose skull structure and facial features fitted those of the man shown in the

surveillance photographs. Only by assembling an array of such photographs could it have been determined whether the witnesses could make a reliable identification of a suspect from an array of photographs of persons each of whom had features fitting those of the man shown in the surveillance photographs.

This was not done. Instead, in each of the two crucial photo spreads shown to the witnesses who identified Green at the trial, all but one of the photographs showed men whose skull structure and features did not even arguably resemble those of the man shown in the surveillance photographs. The one exception, of course, was Green.

This Court can verify for itself the accuracy of the above description of the two crucial photo spreads.* Of the surveillance photographs introduced at the trial, Government Exhibit 1-A (A772) gives a full face view of the man, while Government Exhibit 3 (A774) gives a full right-hand profile view. These views may be directly compared with the full face and right-hand profile views of the men shown in the crucial photo spreads, which are Government Exhibits H-1 (A775-776) and H-20 (A781). Such a comparison will show that, in the case of each of the photo spreads, the only photograph

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* Since this Court is in as good a position as the District Court to compare the photo spreads with the surveillance photographs, this Court may make its own independent evaluation of the photo spreads. See, e.g., United States ex rel. Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973); Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir.), cert. denied, 340 U.S. 810 (1950).

in the photo spread which shows a man whose skull structure and features even arguably resemble those of the man in the surveillance photographs was a photograph of James Melvin Green.* In other words, unless the witnesses were to pick a photograph which did not even arguably resemble the man shown in the surveillance photographs, the only suspect they could pick was Green.

This was no accident. The testimony of the FBI agents who put together the two crucial photo spreads indicates that in each case they started with a photograph of Green and simply added to it a number of other photographs of young black males (A14-A15, A229). So far as their testimony shows, no effort was made to choose photographs of individuals whose skull structure and features in any way resembled those of the man shown in the surveillance photographs.

The record further shows that both of the two crucial photo spreads were unnecessarily and impermissibly suggestive in a distinct and wholly independent respect. As noted above (pp. 15-16), the earliest photo spread which was the subject of testimony at the suppression hearing resulted in a hesitant

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* Even in the case of Green's photographs, the resemblance to the man shown in the surveillance photographs is far from close. A comparison of Green's photographs in the photo spreads in the record (A775, A777, A778, A779, A780, A781) with the surveillance photographs introduced at the trial (A772, A773, A774) will demonstrate that no one could reasonably conclude from these photographs, beyond a reasonable doubt, that Green is the man shown in the surveillance photographs.

and tentative selection of two photographs, showing Green and one Toby Raines (A126, A157-A158). The photograph of Raines was then dropped from every subsequent photo spread which was the subject of testimony at the suppression hearing (see p. 16 supra). There can be no doubt that the dropping of Raines' photograph, after one witness had identified it, was wholly unnecessary. There can likewise be no doubt that the dropping of Raines' photograph sharply increased the likelihood that Green's photograph would be the only one chosen.

The stark suggestiveness of the two crucial photo spreads was accentuated by the fact that each of the four trial witnesses who were shown these spreads understood that the FBI wanted them to pick the suspect from the men shown in the photo spread. This is made clear beyond doubt by the testimony of each of these witnesses at the suppression hearing. Miss Churilla testified that Agent Roach told her that "he wanted me, to the best of my knowledge, to pick the man that I saw on the 25th of February." (A51.) Miss Rivera testified that Agent Roach told her to "try to point out which is the person that I saw on the day of the robbery." (A78.) Mr. White testified that Agent Roach told him that the FBI had someone in mind and "wanted me to identify the person whom I thought was the suspect." (A112.) And Miss Morrison testified that Agent Cavanagh asked her to select someone from the photo spread (A248). This testimony establishes that the cir-

cumstances under which the crucial photo spreads were used in the present case contravened the warning of the Supreme Court that "[t]he chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." Simmons v. United States, 390 U.S. 377, 383 (1968).

The record in the present case thus demonstrates that the photographic identification procedures followed in the present case were grossly and unnecessarily suggestive. Moreover, the record makes plain that in the present case, as in United States v. Reid, 517 F.2d 953, 966 (2d Cir. 1975), the FBI's "failure to follow fair identification procedures was inexcusable . . . ." There was no reason why other photographs of individuals with features fitting those in the surveillance photographs could not have been included in the photo spreads; there was no reason why Raines' photograph should have been dropped from the photo spreads; and there was no excuse for allowing the witnesses to gain the impression that the FBI wanted them to pick the suspect from the men shown in the photo spread.

The record in the present case also establishes that the gross and unnecessary suggestiveness of the two crucial photo spreads was such "as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). As shown above, in each of the two crucial photo spreads Green's photograph was

the only one with features even remotely resembling those shown in the surveillance photographs. Controlled psychological experiments indicate that when eyewitnesses are shown a lineup or photo spread which contains only one person resembling the actual culprit, the likelihood is very high that they will pick that person regardless of whether that person is the actual culprit.

Some of these experiments are reported in an article on eyewitness testimony by Robert Buckhout in the December 1974 issue of Scientific American, a reprint of which is set forth as an Addendum to this brief. Of particular interest is an experiment reported at page 10 of the reprint, in which 52 witnesses to a simulated purse-snatching incident were shown videotapes of two lineups, one of which included the actual purse-snatcher and the other of which included only an individual who resembled the actual culprit. Only seven out of the 52 witnesses picked the actual culprit; twice as many witnesses picked the person who merely resembled the actual culprit.

This Court has previously recognized the very grave danger of irreparable in-court misidentification which is engendered by the use of unnecessarily suggestive photographic identification procedures. In United States v. Evans, 484 F.2d 1178, 1186-87 (2d Cir. 1973), this Court concluded that although suggestive photographic identification procedures had been employed, on the facts of that case they did not give rise to a substantial likelihood of irreparable misidentification at

the trial. In Braithwaite v. Manson, 527 F.2d 363, 369 n.11 (2d Cir. 1975), cert. granted, 96 S. Ct. 1737 (1976), this Court set forth the subsequent history of the Evans case:

> "The subsequent history of the Evans case illustrates the dangers of in-court identification after suggestive pre-trial identification. As a result of the later arrest and confession of another person, the United States Attorney consented to an order vacating Evans' conviction. . . ."

In the Braithwaite case itself, this Court found that the use of suggestive identification procedures gave rise to a substantial likelihood of irreparable misidentification at trial. 527 F.2d at 371-72.

The irreparable nature of the suggestive photographic identification procedures used in the present case is underscored by the brevity of the witnesses' opportunity to observe the robbers, by the length of time it took the witnesses to pick out Green's photograph when they were first shown the photo spread, and by the sharp contradictions between their descriptions and the surveillance photographs. The present case therefore differs from cases such as United States v. Fernandez, 456 F.2d 638, 642-43 (2d Cir. 1972), in which this Court has been able to conclude that the circumstances under which the identification was made precluded any possibility of irreparable misidentification.

As shown above (pp. 6, 8, 9, 12), each of the witnesses who identified Green at the trial had only a brief opportunity to observe the robbers during the robberies them-

selves, and Miss Morrison, the only witness to the robbery of the National Bank of North America on March 8, 1976, testified that her attention had been "riveted" on the gun (A566). None of the witnesses identified Green's photograph immediately upon being shown the photo spreads; instead, each witness examined all of the photographs before selecting a photograph of Green (see pp. 13-15 supra). The selection process lasted as long as two or three minutes in the case of Mr. White, and almost five minutes in the case of Miss Rivera (A28).

There were sharp contradictions between the surveillance photographs and the descriptions of the robbers which were given by the witnesses. The surveillance photographs taken at the Manufacturers Hanover Trust Company at 1185 Avenue of the Americas show a man wearing a full-length coat with a fur collar (see A773, A774). The Manufacturers Hanover witnesses, on the other hand, recalled the man as wearing a "beigeous-brown" cloth coat (Miss Churilla, A452, A475), a dark brownish jacket or shirt which definitely did not have a fur collar (Miss Rivera, A501, A503), or a short cloth coat of a dark color, perhaps a dark plaid (A553). Miss Yu told the FBI that both the man and the woman were above five feet, three inches or five feet, five inches tall (A445), while Miss Churilla remembered the man as being five feet, nine inches tall (A452), and Miss Morrison thought that the man was about five feet, eight inches tall and that the woman was taller (A566-A567). These contradictions point up the severely limited nature of the witnesses' oppor-

tunity to study the robbers, and further confirm the irreparable prejudice that Green suffered from the use of photo spreads which virtually guaranteed that a witness with any recollection of the man shown in the surveillance photographs would pick Green.

The record in the present case establishes that the photographic identification procedures used in the present case were grossly and unnecessarily suggestive. The record also establishes that the suggestiveness of these procedures created a substantial likelihood of irreparably mistaken identification at the trial. Accordingly, the in-court identifications of the defendant-appellant should have been excluded from evidence.

POINT III

THE DISTRICT COURT SHOULD HAVE GRANTED GREEN'S MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT THREE OF THE INDICTMENT

Count Three of the indictment (A4) dealt with the attempted robbery of the First National City Bank branch at 40 West 57th Street on March 5, 1976. The Government's sole eyewitness on this count was Miss Lily Yu (A427-A448).

Miss Yu was not asked to, and did not, identify either Mr. Green or Mrs. Green at the trial. She could not describe the man who attempted to rob her, beyond saying that he was a young black man about five feet, three inches or five feet, five inches tall (A428, A445).* This description, of course, could fit hundreds of thousands of persons in the New York metropolitan area alone.

The Government's only other direct evidence on Count Three of the indictment was a surveillance photograph, which was marked as Government Exhibit 1-A (A772) and which was admitted into evidence over objection (A607-A608).** Again, Miss Yu was not asked to, and did not, identify any of the

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* Miss Yu further testified that she had told the FBI agent that the man wore a short dark leather jacket (A439-A440), but the surveillance photograph shows a man wearing a full-length coat with a cloth collar (see A772).

** The reels of film from which this surveillance photograph was printed were marked as Government Exhibits 4 and 5 (A574-A575) and were also admitted into evidence over objection (A586).

persons shown in Government Exhibit 1-A as the persons who attempted to rob her. The only foundation laid by the Government for the admission of Government Exhibit 1-A consisted of testimony by an employee of Holmes Protection, Inc. to the effect that he had removed the film from which Government Exhibit 1-A was made from one of the surveillance cameras at the First National Bank branch at 40 West 57th Street after the attempted robbery (A572-A577).

The District Court ruled, without objection by the Government, that the jury was to consider the evidence relating to each of the three robberies separately (A740). Nevertheless, the District Court denied Green's motion for a judgment of acquittal on Count Three of the indictment (A665-A666). However, the District Court stated three times on the record that the Government had made out only "a bare prima facie case" on Count Three (A665, A666), and further stated, 'I'm not sure the Government would have proceeded if they had a one count indictment with Count 3 alone . . . ." (A666.)

Defendant-appellant submits that in fact the Government did not even prove "a bare prima facie case" on Count Three, and that the evidence before the jury was insufficient to sustain a conviction of Green on Count Three of the indictment. In order to support a conviction of Green on Count Three of the indictment, the evidence must be such that a reasonable person could find Green guilty beyond a reasonable doubt of the crime charged in Count Three. United States v.

Taylor, 464 F.2d 240, 242-45 (2d Cir. 1972). The evidence in the present case falls far short of this standard.

Aside from the revolver, holster, and bullets taken from Green at his arrest - which, as shown in Point I above, in no way link Green to any of the three robberies involved in this case, and in any event should have been excluded under Rule 403 of the Federal Rules of Evidence - the only evidence against Green on Count Three consisted of Miss Yu's highly generalized description of the man who tried to rob her, which could have fitted hundreds of thousands of other persons just as well as it did Green, and a single surveillance photograph which the Government argued showed Green. No other evidence of any kind placed Green in or near the First National City Bank branch at 40 West 57th Street on or about March 5, 1976.

If this evidence was sufficient to constitute even "a bare prima facie case" against Green on Count Three of the indictment, then the Government could go to the jury on a charge of bank robbery against any defendant it chose - even where no eyewitness would identify that defendant and no other evidence linked that defendant to the scene of the crime - simply by introducing a surveillance photograph showing a person resembling that defendant. This, of course, is not the law. We have been unable to find any reported case in which the Government has even argued that it is the law. It follows that Green's motion for a judgment of acquittal on Count Three of the indictment herein should have been granted.

POINT IV

CHARGES RELATING TO THREE SEPARATE ROBBERIES OR ATTEMPTED ROBBERIES WERE IMPROPERLY JOINED IN ONE INDICTMENT

The original indictment against the defendants in the present case, Indictment No. 76 Cr. 267, related solely to the attempted robbery of the Manufacturers Hanover Trust Company branch at 1185 Avenue of the Americas or February 25, 1976. The indictment on which the defendants were tried (A3-A6) was filed as a superseding indictment on May 28, 1976, less than three weeks before the trial. This indictment added, for the first time, charges based upon the attempted robbery of the First National City Bank branch at 40 West 57th Street on March 5, 1976 (Count Three) and the robbery of the National Bank of North America branch at 515 Seventh Avenue on March 8, 1976 (Counts Four and Five).

Defendant-appellant submits that the joinder in a single indictment of charges relating to these three separate robberies or attempted robberies was improper. Although no motion to sever these charges was made before or during trial, defendant-appellant submits that the prejudice resulting from the joinder of these charges was so substantial and so unjustified that the judgment of conviction should be reversed upon this ground as well as upon the grounds stated in Points I, II, and III above.

Rule 8(b) of the Federal Rules of Criminal Procedure

reads as follows:

> "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 8(b) of the Federal Rules of Criminal Procedure, unlike Rule 8(a) (which applies to joinder of offenses against a single defendant), does not permit joinder of offenses which are merely "of the same or similar character". It is firmly established in this Circuit that joinder of offenses against multiple defendants must satisfy the standards of Rule 8(b) of the Federal Rules of Criminal Procedure, rather than the somewhat looser standards of Rule 8(a). E.g., United States v. Papadakis, 510 F.2d 287, 299-300 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Granello, 365 F.2d 990, 993 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967).

Under Rule 8(b) of the Federal Rules of Criminal Procedure, charges relating to different acts or transactions can be joined only if they constitute part of a "series of acts or transactions constituting an offense or offenses." The authorities make it plain that a "series of acts or transactions" means more than just a number of acts of the same kind. Professor Moore illustrates this distinction by a hypothetical which squarely fits the facts of the present case:

> "The hypothetical assumes that the

> defendants X and Y are accused of having jointly committed Offense #1, a bank robbery. They are also accused of having jointly committed Offense #2, robbery of a different bank at a substantial time later. Since the offenses are factually unrelated, they cannot be considered as coming within the 'transaction or series of transactions' test of Subdivision (b) [of Rule 8 of the Federal Rules of Criminal Procedure]. They are, however, offenses of the same character within Subdivision (a)." 8 J. W. Moore, Federal Practice ¶ 8.06, at 8-25 (2d ed. 1976) (footnotes omitted).

Professor Wright gives a very similar example which illustrates the same distinction. 1 C. A. Wright, Federal Practice and Procedure § 144, at 326-27 (1969).

Thus the joinder in the indictment in the present case of charges relating to three separate bank robberies was improper under Rule 8(b) of the Federal Rules of Criminal Procedure. Moreover, this joinder could not be excused by considerations of trial economy. The proof relating to each of the three robberies was entirely separate and distinct. Indeed, the District Court directed the jury, without objection by the Government, to consider the evidence relating to each of the three robberies separately (A740). The only evidence admitted against Green which the Government alleged bore on all three robberies was the revolver, holster, and bullets taken from Green at his arrest; this evidence consumed a negligible amount of trial time and, for the reasons given in Point I above, defendant-appellant submits that this evidence was improperly admitted in any event.

But while the joinder of the three bank robberies in the same indictment saved little if any trial time, it had an important impact on the outcome of the case. Even though the Court directed the jury to consider the evidence relating to each robbery separately (A740), as a practical matter the jury's consideration of each robbery was inevitably colored by its knowledge of the evidence relating to the other two robberies.

The seriousness of the resulting prejudice is plain from a consideration of the evidence before the jury. The jury did not find this case to be an open-and-shut one. It called for all of the surveillance photographs (A742-A743), and then called for a magnifying glass to examine them (A755). The jury called not only for the revolver taken from Green at his arrest, but also for the holster and bullets, all of which defendant-appellant submits should have been excluded from its consideration (A749-A750). The jury also called for a rereading of the testimony of Miss Churilla and Miss Yu (A742-A743, A750-A751, A759). These facts make it plain that the jury did not find that any one of the three categories of evidence before it - eyewitness testimony, surveillance photographs, and other exhibits - was sufficient to establish guilt beyond a reasonable doubt. Against this background, it is clear that Green was seriously prejudiced by the fact that the jury was permitted to consider the three bank robberies together.

No motion to sever the charges relating to the three

bank robberies was made before or during the trial. Ordinarily such a lack of objection would preclude appellate consideration of the fairness of the joinder. See, e.g., United States v. Papadakis, 510 F.2d 287, 300 (2d Cir.), cert. denied, 421 U.S. 950 (1975). In the present case, however, defendant-appellant submits that the seriousness of the prejudice resulting from the joinder, when weighed against the lack of any justification for the joinder in terms of trial economy, makes the joinder an instance of "plain error . . . affecting substantial rights" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. This is particularly true in light of the fact that two of the three robberies were added by a superseding indictment less than three weeks before trial, a fact which suggests that they were added at least in part in order to bolster the Government's case on the original robbery.

For all these reasons, defendant-appellant submits that the judgment below should be reversed not only on the grounds set forth in Points I, II, and III above, but also on the ground that charges relating to three separate robberies or attempted robberies were improperly joined in a single indictment.

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SCIENTIFIC AMERICAN OFFPRINTS

Eyewitness Testimony

by Robert Buckhout

SCIENTIFIC AMERICAN
DECEMBER 1974
VOL. 231, NO. 6 PP. 23-31

PUBLISHED BY W. H. FREEMAN AND COMPANY 660 MARKET STREET, SAN FRANCISCO, CALIFORNIA 94104

Established 1845 **SCIENTIFIC AMERICAN** December 1974 Volume 231 Number 6

Eyewitness Testimony

Although such testimony is frequently challenged, it is still widely assumed to be more reliable than other kinds of evidence. Numerous experiments show, however, that it is remarkably subject to error

by Robert Buckhout

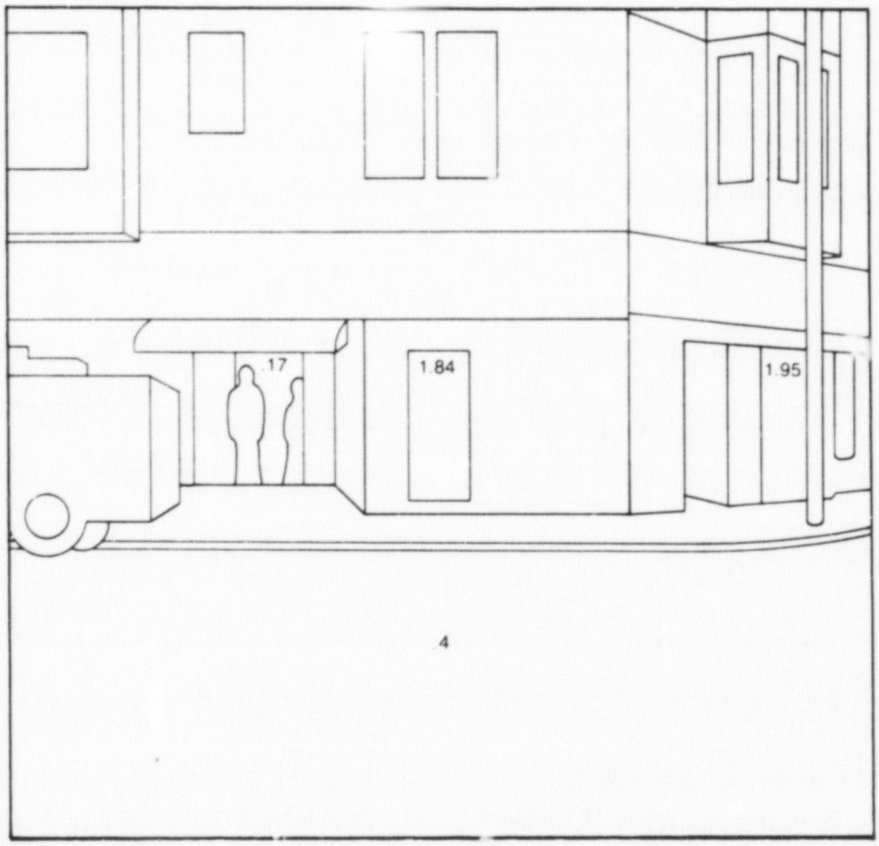
The woman in the witness box stares at the defendant, points an accusing finger and says, loudly and firmly, "That's the man! That's him! I could never forget his face!" It is impressive testimony. The only eyewitness to a murder has identified the murderer. Or has she?

Perhaps she has, but she may be wrong. Eyewitness testimony is unreliable. Research and courtroom experience provide ample evidence that an eyewitness to a crime is being asked to be something and do something that a normal human being was not created to be or do. Human perception is sloppy and uneven, albeit remarkably effective in serving our need to create structure out of experience. In an investigation or in court, however, a witness is often asked to play the role of a kind of tape recorder on whose tape the events of the crime have left an impression. The prosecution probes for stored facts and scenes and tries to establish that the witness's recording equipment was and still is in perfect running order. The defense cross-examines the witness to show that there are defects in the recorder and gaps in the tape. Both sides, and usually the witness too, succumb to the fallacy that everything was recorded and can be played back later through questioning.

Those of us who have done research in eyewitness identification reject that fallacy. It reflects a 19th-century view of man as perceiver, which asserted a parallel between the mechanisms of the physical world and those of the brain. Human perception is a more complex information-processing mechanism. So is memory. The person who sees an accident or witnesses a crime and is then asked to describe what he saw cannot call up an "instant replay." He must depend on his memory, with all its limitations. The limitations may be unimportant in ordinary daily activities. If someone is a little

MISTAKEN IDENTIFICATIONS led to the arrests of two innocent men: Lawrence Berson (*left*) for several rapes and George Morales (*right*) for a robbery. Both men were picked out of police lineups by victims of the crimes. Berson was cleared when Richard Carbone (*center*) was arrested and implicated in the rapes. Carbone was convicted. Later he confessed to the robbery, clearing Morales.

REENACTMENT OF A MURDER was photographed at the same time of night as the murder and from the viewing position of an eyewitness who said he had been 120 feet away. The witness had identified a suspect charged with killing another man in darkened doorway.



MEASUREMENTS OF BRIGHTNESS (in millilamberts) at various points in the scene showed how little light was reflected from the doorway to the eyewitness. The light readings and the photograph (*top*) combined to cast doubt on the accuracy of the identification.

unreliable, if he trims the truth a bit in describing what he has seen, it ordinarily does not matter too much. When he is a witness, the inaccuracy escalates in importance.

Human perception and memory function effectively by being selective and constructive. As Ulric Neisser of Cornell University has pointed out, "Neither perception nor memory is a copying process." Perception and memory are decision-making processes affected by the totality of a person's abilities, background, attitudes, motives and beliefs, by the environment and by the way his recollection is eventually tested. The observer is an active rather than a passive perceiver and recorder; he reaches conclusions on what he has seen by evaluating fragments of information and reconstructing them. He is motivated by a desire to be accurate as he imposes meaning on the overabundance of information that impinges on his senses, but also by a desire to live up to the expectations of other people and to stay in their good graces. The eye, the ear and other sense organs are therefore social organs as well as physical ones.

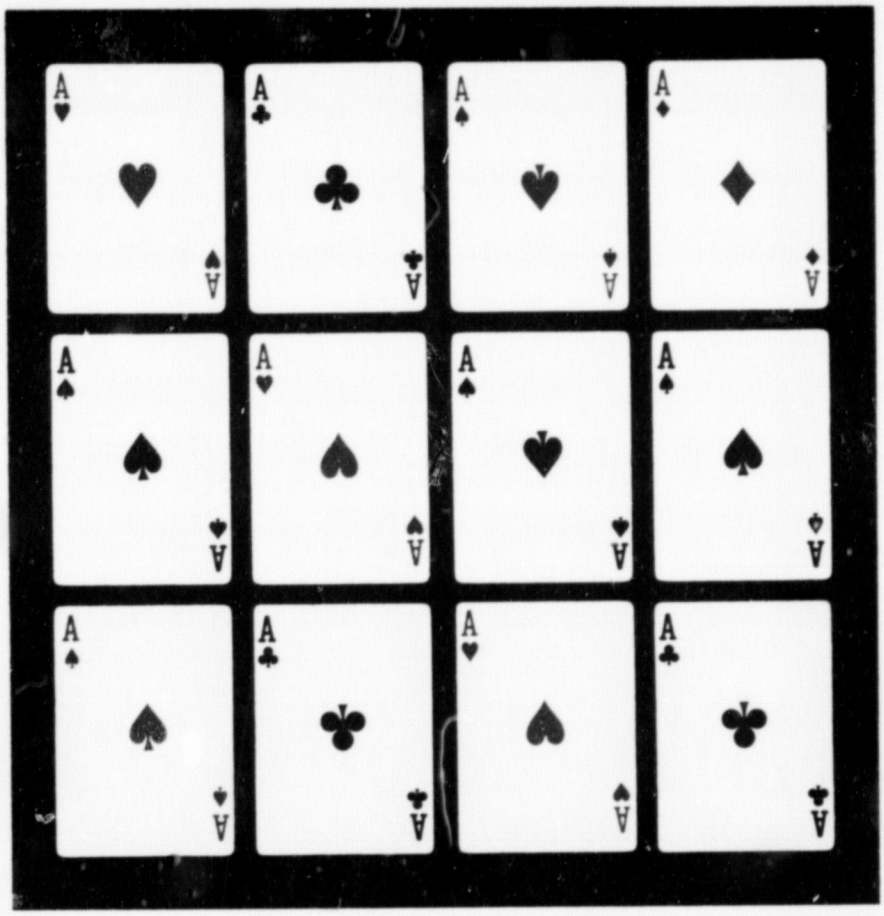
Psychologists studying the capabilities of the sense organs speak of an "ideal observer," one who would respond to lights or tones with unbiased eyes and ears, but we know that the ideal observer does not exist. We speak of an "ideal physical environment," free of distractions and distortions, but we know that such an environment can only be approached, and then only in the laboratory. My colleagues and I at the Brooklyn College of the City University of New York distinguish a number of factors that we believe inherently limit a person's ability to give a complete account of events he once saw or to identify with complete accuracy the people who were involved.

The first sources of unreliability are implicit in the original situation. One is the insignificance—at the time and to the witness—of the events that were observed. In placing someone at or near the scene of a crime, for example, witnesses are often being asked to recall seeing the accused at a time when they were not attaching importance to the event, which was observed in passing, as a part of the normal routine of an ordinary day. As long ago as 1895 J. McKeen Cattell wrote about an experiment in which he asked students to describe the people, places and events they had encountered walking to school over familiar paths. The reports were incomplete and unreliable; some individuals were

very sure of details that had no basis in fact. Insignificant events do not motivate a person to bring fully into play the selective process of attention.

The length of the period of observation obviously limits the number of features a person can attend to. When the tachistoscope, a projector with a variable-speed shutter that controls the length of an image's appearance on a screen, is used in controlled research to test recall, the shorter times produce less reliable identification and recall. Yet fleeting glimpses are common in eyewitness accounts, particularly in fast-moving, threatening situations. In the Sacco-Vanzetti case in the 1920's a witness gave a detailed description of one defendant on the basis of a fraction-of-a-second glance. The description must have been a fabrication.

Less than ideal observation conditions usually apply; crimes seldom occur in a well-controlled laboratory. Often distance, poor lighting, fast movement or the presence of a crowd interferes with the efficient working of the attention process. Well-established thresholds for the eye and the other senses have been established by research, and as those limits are approached eyewitness accounts become quite unreliable. In one case in my experience a police officer testified that he saw the defendant, a black man, shoot a victim as both stood in a doorway 120 feet away. Checking for the defense, we found the scene so poorly lit that we could hardly see a person's silhouette, let alone a face; instrument measurements revealed that the light falling on the eye amounted to less than a fifth of the light from a candle. The defense presented photographs and light readings to demonstrate that a positive identification was not very probable. The members of the jury went to the scene of the crime, had the one black juror stand in the doorway, found they could not identify his features and acquitted the defendant.



HOW MANY ACES OF SPADES DID YOU SEE? After a brief glance at this display of playing cards most people report seeing three. Actually there are five. Because people expect aces of spades to be black, not red, they tend to see only the black ones and to miss the atypical red ones. Thus do prior conditioning and experience influence perception.

The witness himself is a major source of unreliability. To begin with, he may have been observing under stress. When a person's life or well-being is threatened, there is a response that includes an increased heart rate, breathing rate and blood pressure and a dramatic increase in the flow of adrenalin and of available energy, making the person capable of running fast, fighting, lifting enormous weight—taking the steps necessary to ensure his safety or survival. The point is, however, that a person under extreme stress is also a less than normally reliable witness. In experimental situations an observer is less capable of remembering details, less accurate in reading dials and less accurate in detecting signals when under stress; he is quite naturally paying more attention to his own well-being and safety than to nonessential elements in the environment. Research I have done with Air Force flight-crew members confirms that even highly trained people become poorer observers under stress. The actual threat that brought on the stress response, having been highly significant at the time, can be remembered; but memory for other details such as clothing and colors is not as clear; time estimates are particularly exaggerated.

The observer's physical condition is often a factor. A person may be too old or too sick or too tired to perceive clearly, or he may simply lack the necessary faculty. In one case I learned that a witness who had testified about shades of red had admitted to the grand jury that he was color-blind. I testified at the trial that he was apparently dichromatic, or red-green color-blind, and that his testimony was probably fabricated in the basis of information other than visual evidence. The prosecution brought on his ophthalmologist, presumably as a rebuttal witness, but the ophthalmologist testified that the witness was actually monochromatic, which meant he could perceive no colors at all. Clearly the witness was "filling in" his testimony. That, after all, is how color-blind people function in daily life, by making inferences about colors they cannot distinguish.

Psychologists have done extensive research on how "set," or expectancy, is used by the observer to make judgments more efficiently. In a classic experiment done in the 1930's by Jerome S. Bruner and Leo Postman at Harvard University observers were shown a display of playing cards for a few seconds and asked to report the number of aces of spades in the display [*see illustration above*]. After a brief glance most observers reported seeing three aces of spades. Actually there were five; two of them were colored red instead of the more familiar black. People are so familiar with black aces of spades that they do not waste

time looking at the display carefully. The prior conditioning of the witness may cause him similarly to report facts or events that were not present but that he thinks should have been present.

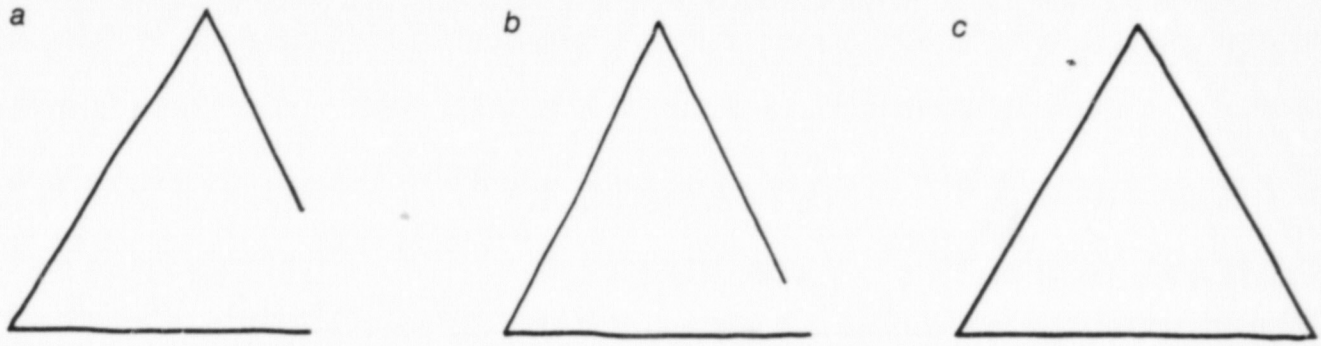
Expectancy is seen in its least attractive form in the case of biases or prejudices. A victim of a mugging may initially report being attacked by "niggers" and may, because of prejudice or limited experience (or both), be unable to tell one black man from another. ("They all look alike to me.") In a classic study of this phenomenon Gordon W. Allport of Harvard had his subjects take a brief look at a drawing of several people on a subway train, including a black man and a white man who is standing with a razor in his hand. Fifty percent of the observers later reported that the razor was in the hand of the black man. Most people file away some stereotypes on the basis of which they make perceptual judgments; such stereotypes not only lead to prejudice but are also tools for making decisions more efficiently. A witness to an automobile accident may report not what he saw but his ingrained stereotype about women drivers. Such short-cuts to thinking may be erroneously reported and expanded on by an eyewitness without his being aware that he is describing his stereotype rather than actual events. If the witness's biases are shared by the investigator taking a statement, the report may reflect their mutual biases rather than what was actually seen.

The tendency to see what we want or need to see has been demonstrated by numerous experiments in which people report seeing things that in fact are not present. R. Levine, Isador Chein and Gardner Murphy had volunteers go without food for 24 hours and report what they "saw" in a series of blurred slides presented on a screen. The longer they were deprived of food the more frequently they reported seeing "food" in the blurred pictures. An analysis of the motives of the eyewitness at the time of a crime can be very valuable in determining whether or not the witness is reporting what he wanted to see. In one study I conducted at Washington University a student dressed in a black bag that covered him completely visited a number of classes. Later the students in those classes were asked to describe the nature of the person in the bag. Most of their reports went far beyond the meager evidence: the bag-covered figure was said to be a black man, "a nut," a symbol of alienation and so on. Further tests showed that the descriptions were related to the needs and motives of the individual witness.

Journalists and psychologists have noted a tendency for people to maintain they were present when a significant historical event took place near where they live even though they were not there at all; such people want to sound interesting, to be a small part of history. A journalist once fabricated a charming human interest story about a naked woman stuck to a newly painted toilet seat in a small town and got it distributed by newspaper wire services. He visited the town and interviewed citizens who claimed to have witnessed and even to have played a part in the totally fictitious event. In criminal cases with publicity and a controversial defendant it is not uncommon for volunteer witnesses to come forward with spurious testimony.

Unreliability stemming from the original situation and from the observer's fallibility is redoubled by the circumstances attending the eventual attempt at information retrieval. First of all there is the obvious fact, supported by a considerable amount of research, that people forget verbal and pictorial information with the passage of time. They are simply too busy coping with daily life to keep paying attention to what they heard or saw; perfect recall of informa-

WHO HAD THE RAZOR? After a brief look at a drawing such as this one, half of the observers report having seen the razor, a stereotyped symbol of violence in blacks, in the black man's hand. Gordon W. Allport of Harvard University devised this experiment.



"FILLING IN" OF DETAILS was demonstrated by a simple drawing test. Observers were shown an incomplete but roughly triangular figure and immediately afterward were asked to draw what they had seen. The typical drawing was a good reproduction of the original (*a*). A month later observers asked to draw what they remembered produced more regular figures (*b*). Three months after the original viewing, again asked to draw what they remembered, they drew erroneously complete, symmetrical figures (*c*).

tion is basically unnecessary and is rarely if ever displayed. The testing of recognition in a police "lineup" or a set of identification photographs is consequently less reliable the longer the time from the event to the test. With time, for example, there is often a filling in of spurious details: an incomplete or fragmentary image is "cleaned up" by the observer when he is tested later. Allport used to have students draw a rough geometric shape right after such a shape was shown to them. Then they were tested on their ability to reproduce the drawing 30 days later and again three months later [*see illustration above*]. The observers tended first to make the figure more symmetrical than it really was and later to render it as a neat equilateral triangle. This finding was repeated with many objects, the tendency being for people to "improve" their recollection by making it seem more logical.

In analyses of eyewitness reports in criminal cases we have seen the reports get more accurate, more complete and less ambiguous as the witness moves from the initial police report through grand-jury questioning to testimony at the trial. The process of filling in is an efficient way to remember but it can lead to unreliable recognition testing: the witness may adjust his memory to fit the available suspects or pictures. The witness need not be lying; he may be unaware he is distorting or reconstructing his memory. In his very effort to be conscientious he may fabricate parts of his recall to make a chaotic memory seem more plausible to the people asking questions. The questions themselves may encourage such fabrication. Beth Loftus of the University of Washington has demonstrated how altering the semantic value of the words in questions about a filmed auto accident causes witnesses to distort their reports. When witnesses were asked a question using the word "smashed" as opposed to "bumped" they gave higher estimates of speed and were more likely to report having seen broken glass—although there was no broken glass.

Unfair test construction often encourages error. The lineup or the array of photographs for testing the eyewitness's ability to identify a suspect can be analyzed as fair or unfair on the basis of criteria most psychologists can agree on. A fair test is designed carefully so that all faces have an equal chance of being selected by someone who did not see the suspect; the faces are similar enough to one another and to the original description of the suspect to be confusing to a person who is merely guessing; the test is conducted without leading questions or suggestions. All too frequently lineups or photograph arrays are carelessly assembled or even rigged. If, for example, there are five pictures, the chance should be only one in five that any one picture will be chosen on the basis of guessing.

Frequently, however, one picture—the picture of the suspect—may stand out. In the case of the black activist Angela Davis one set of nine photographs used to check identification included three pictures of the defendant taken at an outdoor rally, two police "mug shots" of other women with their names displayed, a picture of a 55-year-old woman and so on. It was so easy for a witness to rule out five of the pictures as ridiculous choices that the test was reduced to four photographs, including three of Miss Davis. The probability was therefore 75 percent that a witness would pick out her picture whether he had seen her or not. Such a "test" is meaningless to a psychologist and is probably tainted as evidence in court.

Research on memory has also shown that if one item in the array of photographs is uniquely different—say in dress, race, height, sex or photographic quality—it is more likely to be picked out. Such an array is simply not confusing enough for it to be called a test. A teacher who makes up a multiple-choice test includes several answers that sound or look alike to make it difficult for a person who does not know the right answer to succeed. Police lineups and picture layouts are multiple-choice tests; if the rules for designing tests are ignored, the tests are unreliable.

No test, with photographs or a lineup, can be completely free of suggestion. When a witness is brought in by the police to attempt an identification, he can safely assume that there is some reason: that the authorities have a suspect in mind or even in custody. He is therefore under pressure to pick someone even if the officer showing the photographs is properly careful not to force the issue. The basic books on eyewitness identification all recommend that no suggestions, hints or pressure be transmitted to the witness, but my experience with criminal investigation reveals frequent abuse by zealous police officers. Such abuses include making remarks about which pictures to skip, saying, "Are you sure?" when the witness makes an error, giving hints, showing enthusiasm when the "right" picture is picked and so on. There is one version of the lineup in which five police officers in civilian clothes stand in the line, glancing obviously at the one real suspect. Suggestion can be subtler. In some experiments the test giver was merely instructed to smile and be very approving when a certain kind of photograph or statement was picked; such social approval led to an increase in the choosing of just those photographs even though there was no "correct" answer. A test that measures a need for social approval has shown that people who are high in that need

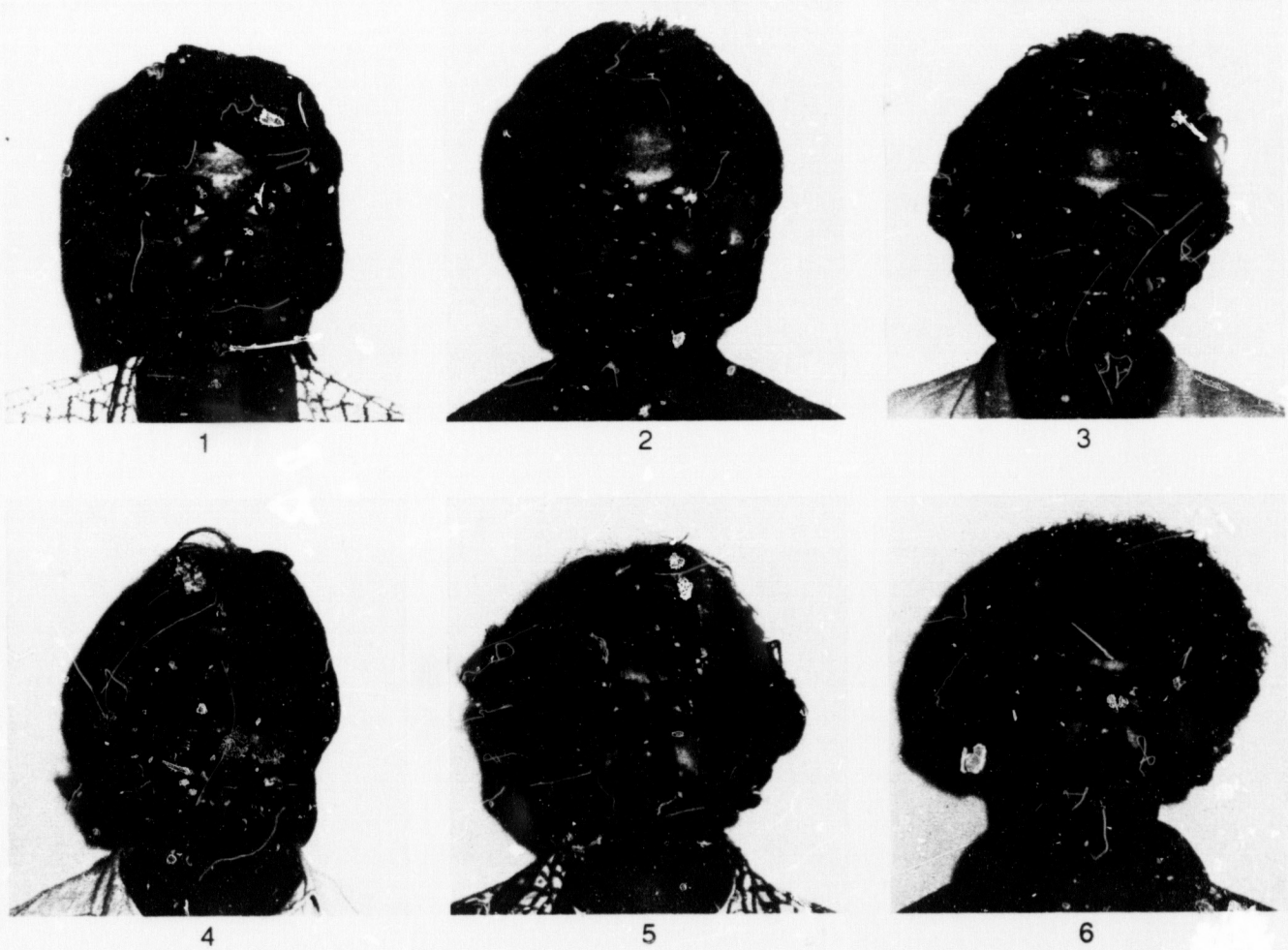
(particularly those who enthusiastically volunteer information) are particularly strongly influenced by suggestion and approval coming from the test giver.

Conformity is another troublesome influence. One might expect that two eyewitnesses—or 10 or 100—who agree are better than one. Similarity of judgment is a two-edged sword, however: people can agree in error as easily as in truth. A large body of research results demonstrates that an observer can be persuaded to conform to the majority opinion even when the majority is completely wrong. In one celebrated experiment, first performed in the 1950's by Solomon E. Asch at Swarthmore College, seven observers are shown two lines and asked to say which is the shorter. Six of the people are in the pay of the experimenter; they all say that the objectively longer line is the shorter one. After hearing six people say this, the naïve subject is on the spot. Astonishingly the majority of the naïve subjects say that the long line is short—in the face of reality and in spite of the fact that alone they would have no trouble giving the correct answer [see "Opinions and Social Pressure," by Solomon E. Asch; SCIENTIFIC AMERICAN, November, 1955].

To test the effect of conformity a group of my students at Brooklyn College, led by Andrea Alper, staged a "crime" in a classroom, asked for individual descriptions and then put the witnesses into groups so as to produce composite descriptions of the suspect. The group descriptions were more complete than the individual reports but gave rise to significantly more errors of commission: an assortment of incorrect and stereotyped details. For example, the groups (but not the individuals) reported incorrectly that the suspect was wearing the standard student attire, blue jeans.

The effects of suggestion increase when figures in obvious authority do the testing. In laboratory research we find more suggestibility and changing of attitudes when the tester is older or of apparently higher status, better dressed or wearing a uniform or a white coat—or is a pretty woman. In court I have noticed that witnesses who work together under a supervisor are hard put to disagree with their boss in testifying or in picking a photograph. The process of filling in details can be exaggerated when the boss and his employee compare their information and the employee feels obligated to back up his boss to remain in his good graces. Legal history is not lacking in anecdotes about convict witnesses who were rewarded by the authorities for their cooperation in making an identification.

In criminal investigations, as in scientific investigations, a theory can be a powerful tool for clarifying confusion, but it can also lead to distortion and unreliability if people attempt, perhaps unconsciously, to make fact fit theory and close their minds to the real meanings of facts. The eyewitness who feels pressed to say something may shape his memory to fit a theory, particularly a highly publicized and seemingly reasonable one. Robert Rosenthal of Harvard studied this effect. He devised a test in



TWO LAYOUTS OF PHOTOGRAPHS like these were presented to witnesses to a staged assault. The actual attacker had been the young man labeled No. 5. In the unbiased spread (*left*) the portraits are aligned and show similar full-face views; in the biased spread (*right*) the culprit's head is tilted and he is gazing upward and the portrait itself is placed at an angle. Witnesses were shown one

which people were supposed to pick out a "successful" face from a set of photographs. There was actually no correct answer, but the experimenter dropped hints to his assistants as to what he thought the results should be. When they subsequently administered the test the assistants unconsciously signaled the subjects as to which photograph to pick, thus producing results that supported their boss's theory. Any test is a social interaction as well as a test.

There is a nagging gap between data on basic perceptual processes in controlled research settings and important questions about perception in the less well-controlled real world. Inspired by the new approach to perception research exemplified in the work of Neisser and of Ralph Norman Haber of the University of Rochester, my colleagues and I have felt that this gap can only be bridged by conducting empirical research on eyewitness identification in a somewhat real world. In one such experiment we staged an assault on the campus of the California State University at Hayward: a student "attacked" a professor in front of 141 witnesses; another outsider of the same age was on the scene as a bystander. We recorded the entire incident on videotape so that we could compare the true event with the eyewitness reports. After the attack we took sworn statements from each witness, asking them to describe the suspect, his clothes and whatever they could remember about the incident. We also asked each witness to rate his own confidence in the accuracy of his description.

As we expected, the descriptions were quite inaccurate, as is usually the case in such situations. The passage of time was overestimated by a factor of almost two and a half to one. The average weight estimate for the attacker was 14 percent too high, and his age was underestimated by more than two years. The total accuracy score, with points given for those judgments and for others on appearance and dress, was only 25 percent of the maximum possible score. (Only the height estimate was close. This may be because the suspect was of average height; people often cite known facts about the "average" man when they are uncertain.)

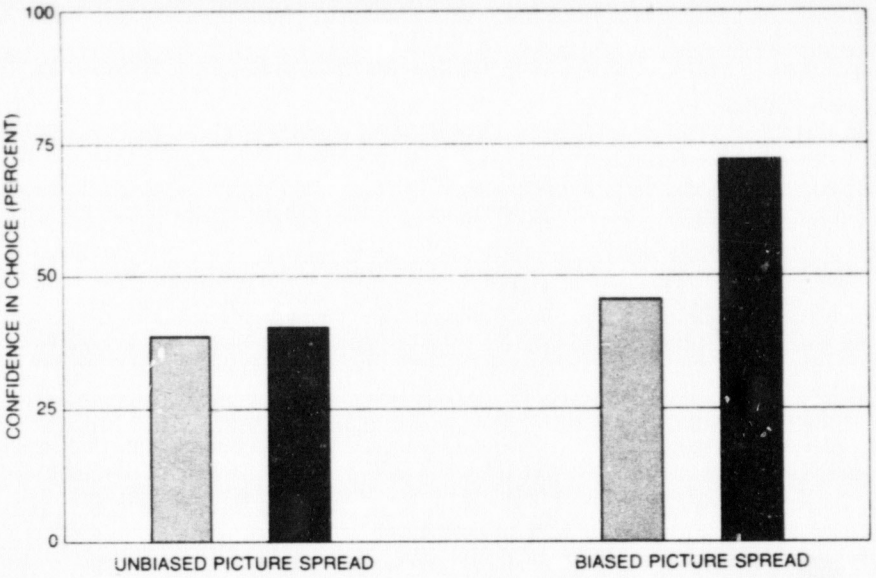
We then waited seven weeks and presented a set of six photographs to each witness individually under four different experimental conditions. There were two kinds of instructions: low-bias, in which witnesses were asked only if they recognized anybody in the photographs and high-bias, in which witnesses were reminded of the attack incident, told that we had an idea who the suspect was and asked to find the attacker in one of two arrangements of photographs, all well-lit frontal views of young men including the attacker and the bystander. In the unbiased picture spread all six portraits were neatly set out with about the same expression on all the faces and with similar clothing. In the biased spread the attacker was shown with a distinctive expression and his portrait was positioned at an angle [*see illustration on these two pages*].

Only 40 percent of the witnesses iden-

1 2 3

4 5 6

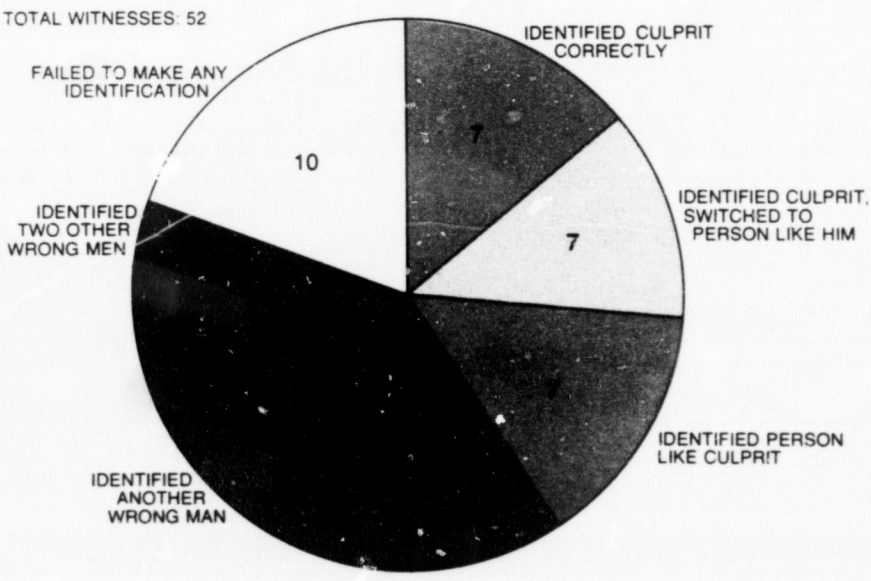
of the spreads after having been given one of two kinds of instructions: either low-bias (simply, "Do you recognize any of these men?") or high-bias (such as, "One of these men is a suspect in that assault we saw; it is important that you identify him for us"). Whereas 40 percent of all the witnesses picked No. 5, 61 percent of those who saw the biased spread and got biased instructions did so.



BIASED CONDITIONS gave observers more confidence in their ability to recognize faces in the picture layouts displayed on the two preceding pages. The bars show the degree of confidence expressed by those who picked from the unbiased spread (*left*) and the biased one (*right*) and after having been given low-bias (*color*) and high-bias (*gray*) instructions.

tified the suspect correctly; 25 percent of them identified the innocent bystander instead; even the professor who was attacked picked out the innocent man. The highest proportion of correct identifications, 61 percent, was achieved with a combination of a biased set of photographs and biased instructions. The degree of confidence in picking suspect No. 5, the attacker, was also significantly higher in that condition [*see illustration above*]. We have subsequently tested the same picture spreads with groups that never saw the original incident. We describe the assault and ask people to pick the most likely perpetrator. Under the biased conditions they too pick No. 5.

In another study undertaken at Brooklyn College a student team, led by Miriam Slomovits, staged a live purse-snatching incident in a classroom. We gave the witnesses the usual questionnaire and got the usual bad scores. This time, however, we were concerned with a specific dilemma: Why is recognition so much better than recall? In private



REAL CULPRIT in a staged purse-snatching incident was identified by only seven of 52 witnesses who viewed two videotaped lineups. Seven others picked the culprit first but then switched to a man who looked like him in the second lineup; seven picked only the man who looked like him. Most witnesses picked other people or were unable to choose.

most lawyers and judges agree that the recall of a crime by a witness is very bad, but they still believe people can successfully identify a suspect. What we had to do was to break away from our demonstrations of how bad witnesses are at recalling details and search for what makes a witness good at recognizing a face. To do so we took the witnesses who had predictably given poor recall data and gave them a difficult recognition test. Our witnesses got not only a lineup with the actual purse-snatcher in the group but also a second lineup that included only a person who looked like the purse-snatcher. The question was: Would the witnesses pick only the real culprit and avoid making a mistaken identification of the person who looked like him?

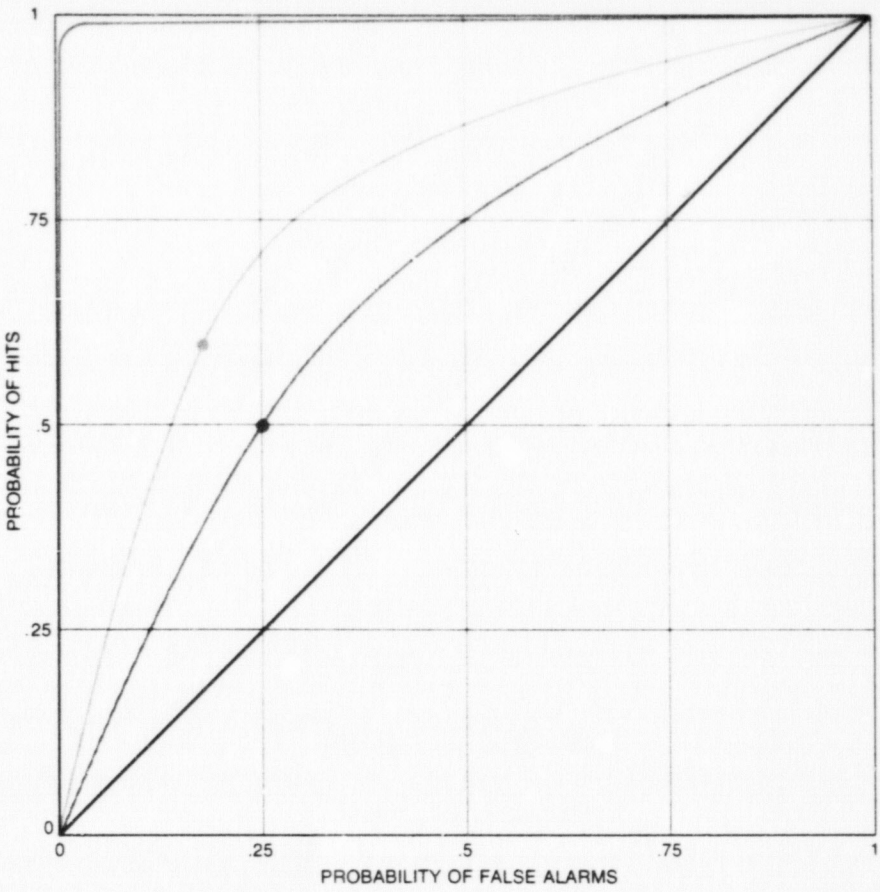
We videotaped two lineups of five persons each and showed them in counterbalanced order to 52 witnesses of the purse-snatching. Very few witnesses were completely successful in making a positive identification without ambiguity. An equal number of witnesses impeached themselves by picking the man who resembled the culprit after having correctly picked the culprit. Most people simply made a mistaken identification [*see bottom illustration on this page*]. Our best witnesses had also been among the best performers in the recall test, that is, they had made significantly fewer errors of commission (adding incorrect details). They had not given particularly complete reports, but at least they had not filled in. The good witnesses also expressed less confidence than witnesses who impeached themselves. Finally, when we referred to the earlier written descriptions of the suspect we found our successful witnesses had given significantly higher, and hence more accurate, estimates of weight. People guessing someone's weight often invoke a mental chart of ideal weight for height and err substantially if the person is fat. Our purse-snatcher was unusually heavy, something the successful witnesses managed to observe in spite of his loose-fitting clothing. The others were guessing.

Once again we noted that witnesses tend not to say, "I don't know." Eighty percent of our witnesses tried to pick the suspect even though most of them were mistaken. The social influence of the lineup itself seems to encourage a "yes" response. This effect presented a disturbing problem that actually drove us back from these rather realistically enacted crimes to the more controlled, emotionally neutral environment of the laboratory. We hoped to design a test for eye-

witnesses that could distinguish a good witness from a poor one, under circumstances in which we knew what the true facts were.

Pure measures of accuracy would not be adequate, since there are many different kinds of error, some of which come from the witness's desire to please the questioner with an abundance of details. Eventually we settled on adapting signal-detection theory, espoused by John A. Swets of the Massachusetts Institute of Technology, to the eyewitness situation. Signal-detection theory evolved in psychophysics as a means of coping with the fact that an observer's attitude "interferes" with his detection, processing and reporting of sensory stimuli. Limited to saying "yes" or "no" (I hear or see or smell it, or whatever), the observer applies criteria that vary with personality, experience, anticipated cost or reward, motivation to please the tester or to frustrate him and other factors. What the experimenter does, therefore, is usually to present noise about half of the time and signals plus noise about half of the time and to count correct "yes" answers (hits) and incorrect "yes" answers (false alarms), combining the scores statistically into a single measure of observer sensitivity. This quantifies an estimate of the observer's criteria for judging his immediate experience. A very cautious person might have very few false alarms and a high proportion of hits, indicating that he says "yes" sparingly; a less than cautious person might say "yes" most of the time, scoring a large number of hits but only at the price of a large number of false alarms.

In our research at Brooklyn College Lynne Williams and I now show a film of a supposed crime and then present to the observers 20 true statements about the incident and the same number of false statements. The witness indicates "yes" or "no" as to the truth of each statement. We end up with a record of hits and false alarms which, after some complicated statistical processing, yields a curve called a receiver-operating-characteristic (ROC) curve [*see illustration on this page*]. A person whose hits and false alarms were equal, indicating that the answers had no relation to the true facts, would generate a straight diagonal ROC curve. A perfect witness would have all hits and no false alarms. Real people fall somewhere in between. We have found so far that witnesses with the better (which is to say higher) ROC curves go on to do better than other people at recognizing the suspect in a lineup. We are using the ROC function to test various hypotheses about how environmental conditions, stress, mental set, bias in interrogation, age, sex, and social, ethnic and economic group affect the accuracy and reliability of eyewitnesses.



PERFORMANCE AS A WITNESS is measured by plotting "hits" against "false alarms." Hits are "yes" answers regarding the truth of a true descriptive detail of a scene the witness has viewed; false alarms are "yes" answers regarding the truth of a false detail. "Witness sensitivity curves" are generated by the results for various witnesses or for answers given by the same witness with varying degrees of confidence. A perfect witness would be one who always scored hits and never scored false alarms (*solid color curve*); a "blind" witness would score as many hits as false alarms (*black*). In the author's experiment successful witnesses, who identified a suspect correctly in a lineup, had produced curves that were higher on the chart; they averaged 12 hits to 3.6 false alarms (*light color*). Unsuccessful witnesses had produced lower curves, averaging 10 hits to five false alarms (*gray*). Scores are plotted as fractions of the maximum possible scores: 20 hits or 20 false alarms.

Psychological research on human perception has advanced from the 19th-century recording-machine analogy to a more complex understanding of selective decision-making processes that are more human and hence more useful. My colleagues and I feel that psychologists can make a needed contribution to the judicial system by directing contemporary research methods to real-world problems and by speaking out in court (as George A. Miller of Rockefeller University puts it, by "giving psychology away").

It is discouraging to note that the essential findings on the unreliability of eyewitness testimony were made by Hugo Münsterberg nearly 80 years ago, and yet the practice of basing a case on eyewitness testimony and trying to persuade a jury that such testimony is superior to circumstantial evidence continues to this day. The fact is that both types of evidence involve areas of doubt. Circumstantial evidence is tied together with a theory, which is subject to questioning. Eyewitness testimony is also based on a theory, constructed by a human being (often with help from others), about what reality was like in the past; since that theory can be adjusted or changed in accordance with personality, with the situation or with social pressure, it is unwise to accept such testimony without question. It is up to a jury to determine if the doubts about an eyewitness's testimony are reasonable enough for the testimony to be rejected as untrue. Jurors should be reminded that there can be doubt about eyewitness testimony, just as there is about any other kind of evidence.

The Author

ROBERT BUCKHOUT is associate professor of psychology and director of the Center for Responsive Psychology at Brooklyn College of the City University of New York. "I was born in Brooklyn," he writes, "and after leaving with a vow never to return, I am back—minutes away from where I was born. My career as a psychologist began as a major subject chosen after minoring in mistakes. After taking a master's degree at North Carolina State University I spent four years in the Air Force. I went to Ohio State University, obtaining my Ph.D. In 1963 I began teaching at Washington University and getting involved in the social problems of the time." Buckhout adds that he owes "more than I can express in words" to a group of undergraduates who helped him with the research on which his article is based. They include Andrea Alper, Susan [illegible]ern, Robinsue Frohboese, Richard H[illegible]wood, Daryl Figueroa, Ethan Hoff, Carolyn Hogan, Noreen Norton, Vincent Reilly, Betti Sachs, Glen Silverberg, Miriam Slomovits and Lynne Williams. He writes that he is "also indebted to Leo Branton and Howard Moore, attorneys, who taught me to present psychology in English to a jury."

Bibliography

ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME. Hugo Munsterberg. Doubleday, Page and Company, 1915.

EYEWITNESS IDENTIFICATION IN CRIMINAL CASES. Patrick M. Wall. Charles C. Thomas, Publisher, 1965.

EXPERIMENTOR EFFECTS IN BEHAVIORAL RESEARCH. Robert Rosenthal. Appleton-Century-Crofts, 1966.

THROUGH A BAG, DARKLY, Robert Buckhout in *American Psychologist*, Vol. 23, No. 11, pages 832-833; November, 1968.

CONCLUSION

For the reasons given above, the judgment of conviction entered against defendant-appellant James Melvin Green by the United States District Court for the Southern District of New York on September 14, 1976 should be reversed, and the case should be remanded with directions to dismiss Count Three of the indictment and to sever Counts One and Two from Counts Four and Five of the indictment against defendant-appellant James Melvin Green.

Dated: New York, New York
November 26, 1976

Respectfully submitted,

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ADDENDUM